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SUPREME COURT U.S.

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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner,

-against-

STATE OF GEORGIA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED

Whether in a capital case the Sixth, Eighth and Fourteenth Amendments to the Constitution forbid the exclusion of a veniremen on the ground that because of his conscientious scruples he would not vote to impose the death penalty under any circumstances, (1) where the exclusion is based on the mistaken belief that it was required by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), (2) where the jury ultimately selected was instructed that regardless of the facts it found it could reject the death penalty for any reason whatsoever or for no reason, and (3) where the excluded juror would have been fully able to obey the law, the court's instructions, and his oath?

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OPINION BELOW

The decision of the Supreme Court of Georgia is appended to this petition at 1a. It is reported at ____ Ga. ____, 290 S.E.2d 43 (1982).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 6, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

STATEMENT OF THE CASE

Petitioner William Alvin Smith was tried, convicted and sentenced to death by a jury in a bifurcated proceeding in the Superior Court of Oglethorpe County, Georgia, for the murder and armed robbery of one Daniel Lee T er. Petitioner now seeks a writ of certiorari from this Cou he Supreme Court of Georgia to review that court's affirma f his conviction and sentence.

The selection of petitioner's jury which gave rise to the question presented in this case occurred on September 14, 1981. Following a group voir dire by panels, the veni were examined individually by the court on their attit toward capital punishment. Each prospective juror was ask specifically whether he was "conscientiously opposed to capital punishment." Only those jurors who indicated oppo- sition were questioned further. One such juror, John W. Mor , was excluded by the court, over petitioner's counsel's objec tion, because of his beliefs. App. 12a - 16a.

Initially, this juror said that he had "mixed emotions" about capital punishment, and simply did not know whether h could vote for the death penalty. App. 13a. He also sa that his convictions would not prevent him from rendering a verdict of guilty. After considerable further inquiry by the court, Mr. Monk concluded that "right at this time" there were no circumstances he could think of under which he would vote to impose the death penalty. App. 14a - 15a. On request of the district attorney, the court excused Mr. Monk from serving.

In response to the objection of petitioner's counsel, the court stated that under Witherspoon v. Illinois, 391 U.S. 510 (1968), it had "a duty to excuse" this venireman. App. 15a - 16a.

As previously mentioned, petitioner was found guilty after the first phase of his trial, and additional evidence was then presented concerning the State's request for the death penalty. The court then instructed the jury that if it found the proffered aggravating circumstance beyond a reasonable doubt, it was authorized but not required to impose death, App. 19a. Rather, the court charged, the sentence the jury then imposed "is a matter entirely within your discretion and you may provide for a life sentence for this accused for any reason that is satisfactory to you or without any reason if you care to do so." App. 19a.

After deliberating approximately forty minutes, the jury returned with a sentence of death. The Supreme Court of Georgia upheld both conviction and sentence. App. 1a.

In capital cases where the death penalty is imposed, the Georgia Supreme Court reviews "each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the [Georgia] Supreme Court." The Georgia Unified Appeal Procedure, Part IV (B)(2), Appendix to Chapter 27-25, following Ga. Code Ann. §27-2538 (Supp. 1981). Thus, although petitioner's counsel on appeal did not brief or argue the question presented here,

he did not thereby waive the claim of error. The Georgia Supreme Court stated in its opinion that "[a]s provided for by the Unified Appeal Procedure, we have reviewed independently the record and transcript and find no significant potential of error other than those enumerated by the appellant." App. 6a-7a. Accordingly the court did not discuss in its opinion the question presented here. Prior decisions of the Georgia Supreme Court had already rejected similar claims of unconstitutional exclusion of death-scrupled jurors, on the authority of Witherspoon. E.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 66 (1979); Potts v. State, 241 Ga. 67, 243 S.E.2d 510, 514-515 (1978).

REASONS FOR GRANTING THE WRIT

As the sheer number of this Court's decisions following Witherspoon v. Illinois attests,[1/] the exclusion of prospective jurors in capital cases because of their conscientious scruples against the death penalty raises important federal questions. One of those questions is presented here -- whether it is constitutional to exclude for cause veniremen who are so opposed to capital punishment that they would refuse to vote for the death penalty in any case. This question, of immense significance to the conduct of capital cases throughout the United States, has never been definitively resolved by this

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1/ E.g. Adams v. Texas, 448 U.S. 38 (1980); Lockett v. Ohio, 438 U.S. 586, 595-596 (1978); Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

Court. In Adams v. Texas, 448 U.S. 38 (1980), however, this Court strongly implied that such "death-qualification" of jurors would indeed be unconstitutional, at least under circumstances in which the excluded jurors would have been able to obey the law, the trial court's instructions, and their oaths. Although those circumstances obtain in Georgia, one such juror was excluded, on the mistaken belief that Witherspoon so required, from petitioner's trial. Consistent with its previous decisions, the Georgia Supreme Court recognized no error in this exclusion. Because this petition presents an important federal question, and because the position of the courts below on that question was based on a misreading of Witherspoon and conflicts with the reasoning of Adams v. Texas, this Court should grant the writ.

In Witherspoon v. Illinois, this Court held that under the Sixth and Fourteenth Amendments, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. Further, the Court said that a venireman may not be excluded for cause even if he indicates that there are some kinds of cases in which he would absolutely refuse to recommend capital punishment -- and even though the very case before him may appear to be one of those kinds. 391 U.S. at 522 n.21. The Court left open the possibility of exclusion in only two situations, saying:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 522-523 n.21. The exclusion of veniremen who refuse to vote for the death penalty in any kind of case was not, however, at issue in Witherspoon, and the Court expressly reserved judgment on the constitutionality of that practice.[2/]

Following Witherspoon, this Court had numerous opportunities to reaffirm its uncompromising holding that nothing short of either a juror's unequivocal refusal to impose the death penalty in any case or a juror's inability to follow the law would justify exclusion of that juror.[3/] In Davis v. Georgia, 429 U.S. 122 (1976), the Court held that the exclusion of even one juror in violation of the Witherspoon standards sufficed to invalidate a death sentence subsequently imposed. In Adams v. Texas, the latest case in which this Court has addressed the propriety of juror death-qualification, the Court held the Witherspoon standards fully applicable to

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2/ The Court not only emphasized that this issue was not before it, 391 U.S. at 513-514, but also declared specifically that nothing it said had any bearing on the question, 391 U.S. at 522-523 n.21. See also Adams v. Texas, 448 U.S. at 47-48.

3/ See the cases cited in footnote 1, supra.

bifurcated trials for capital offenses conducted under the Texas death penalty statute. It is clear after Adams and Davis that Witherspoon's vitality is unimpaired. To date, however, the propriety of the exclusion of veniremen who would not impose death in any case -- the question on which this Court reserved judgment in Witherspoon -- has remained unresolved.

Significantly, however, in Adams v. Texas, this Court in effect explained and reinterpreted Witherspoon so as to cast the most serious doubt on the validity of such an exclusion, at least in the circumstances of petitioner's trial.[4/] In Adams the Court said that the line of cases since Witherspoon

> establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

4/ Other developments in Sixth and Eighth Amendment jurisprudence during the interval between Witherspoon and Adams also contribute to undermining the constitutional validity of death-qualification of jurors in capital cases. These developments include the establishment of the Sixth Amendment right to juries impartially drawn from a representative cross-section of the community, Taylor v. Louisiana, 419 U.S. 522, 528 (1976), and the recognition that to comply with the Eighth Amendment, capital juries must be able to exercise their guided discretion in accordance with contemporary community values, Woodson v. North Carolina, 428 U.S. 280, 295 (1976) (plurality opinion).

448 U.S. at 45. The Court explained that the two situations in which Witherspoon left open the possibility of exclusion were consistent, in the particular circumstances of that case, with "the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths":

> For example, a juror would no doubt violate his oath if he were not impartial on the question of guilt. Similarly, the Illinois law in effect at the time Witherspoon was decided required the jury at least to consider the death penalty, although it accorded the jury absolute discretion as to whether or not to impose it. A juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment.

448 U.S. at 44. Nonetheless, the Court emphasized in Adams, "it is clear beyond peradventure that Witherspoon is not a ground for challenging any prospective juror." 448 U.S. at 47-48. Rather, under Witherspoon as interpreted in Adams, the rule is clear that "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." 448 U.S. at 48.

The exclusion at petitioner's trial of prospective juror John W. Monk clearly offended this uncompromising standard. Monk was excluded not by operation of any State law, but rather on the erroneous understanding that Witherspoon so required.[5/] App. 16a. There was no indication from his

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5/ There is no explicit requirement in Georgia law that jurors in capital cases even be willing to consider the death penalty.

voir dire that Monk would have any difficulty obeying his oath or following the court's instructions. To the contrary, Monk affirmed that he would have no trouble rendering a verdict of guilty if the evidence warranted it. App. 13a. Nor would Monk's principles have been an obstacle to his performance of his responsibilities during the penalty phase of petitioner's trial. For petitioner's jury was specifically instructed, in accordance with Georgia law, that even if it found beyond a reasonable doubt the statutory aggravating circumstance which would permit it to impose the death penalty, it would be under no obligation whatsoever to do so. Rather, the court charged that the sentence the jury then imposed would remain entirely within its discretion; and that the jury could still provide for a life sentence for any reason whatsoever or even without any reason if it cared to do so. App. 19a. Had Monk been asked during his voir dire whether he could follow this instruction or any of the other instructions actually given, he obviously could have answered yes. Given this instruction, Monk's scruples would not have impaired his ability to decide impartially any question of fact, including for instance the existence of any statutory aggravating circumstance on which a death penalty might depend. He could then have refused to impose that penalty because of his conscientious objections and still have remained fully obedient to the law as charged by the court. Indeed, there is an inherent contradiction in excluding a prospective juror, because of his thoughtful objection to the death penalty on the highest moral grounds, when each juror who

is permitted to serve is then solemnly instructed that regardless of the evidence he may reject the death penalty for any or no reason whatsoever.[6/] No legitimate interest of the State is served by such an illogical approach to jury selection in capital cases.[7/]

Moreover, the death-qualification of jurors gravely impairs the fundamental role the sentencing jury plays in a capital case. As this Court said in Witherspoon and has reiterated since, "a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience

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6/ Furthermore, it is difficult to reconcile the exclusion of a juror like Monk when, as this Court said in Witherspoon, 391 U.S. at 522 n.21, jurors who would absolutely refuse to impose capital punishment in some (but not all) general categories of cases for which that punishment is authorized cannot be excluded.

7/ At most, the State can assert an interest in obtaining a jury that will "obey the law" and impose the death penalty in every "appropriate" case. But, under the death penalty statutes of Georgia and most other states, a juror "obeys the law" and determines whether or not the case before him is an "appropriate case" for capital punishment by exercising a discretion which, though guided, necessarily responds to the juror's own attitudes and principles regarding fit punishment as much as to the facts of the case. A venireman with conscientious and principled, even inflexible, scruples against the death penalty is not incapable of complying with the law under such a statutory scheme. For principled opposition to the death penalty takes a variety of forms. Any juror who considers a case and concludes that it does not warrant the extreme penalty is -- unless he acts in the wholly arbitrary and capricious manner forbidden by Furman v. Georgia, 408 U.S. 238 (1972) -- acting pursuant to some principle of broader or narrower scope which decrees that death is not an acceptable punishment in the case. The State does not purport to dictate the contours of the governing principle; it does not, and constitutionally cannot, require

[Continued on next page]

of the community on the ultimate question of life or death."

391 U.S. at 519. Amplifying this language, the Court explained:

> [O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

391 U.S. at 519 n.15, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). The systematic exclusion from jury service in capital cases of members of the community

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7/ [Continued]
the death penalty in any case; and, while it may offer the juror some non-mandatory guidelines, and may even forbid the application of the death penalty unless certain facts (i.e., "aggravating cumstances") are found, it does not (and, once again, it constitutionally cannot) undertake to limit the juror's plenary authority to spare the defendant in any case or according to any principle. See Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 874 (1982). How then can the State tax a venireman with failure or inability to obey the law merely because the venireman acts, or says that he will act, according to the broadest principle, and will spare the defendant in every case since neither that case nor any other merits capital punishment in his view? This venireman's judgment that the present case does not warrant a death sentence is no less responsible, no less considered, and no less obedient to the law, for being responsive to the particular principle which he follows. Obviously, his conclusion that the death penalty should never be imposed embraces the judgment that it should not be imposed in the case at bar; and the latter judgment is one that the State leaves jurors free to make in the uninhibited exertion of any other principle or none at all.

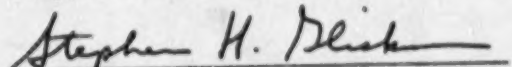
because they have thought seriously on capital punishment and reject it as inconsistent with their highest moral values threatens to sever the "link" of which this Court spoke, seriously limiting the ability of the juries which are chosen to reflect the "conscience of the community."

From the foregoing, it is evident that the death-qualification of petitioner's jury raises an unresolved federal question of the utmost importance to the administration of capital punishment schemes throughout the United States. The position of the courts below was premised on a mistaken conception of Witherspoon, and is inconsistent with the reasoning of Adams. For these reasons, it is imperative that this Court grant petitioner's request and resolve the question presented.

CONCLUSION

For the reasons stated herein, petitioner requests that the writ of certiorari be granted.

Respectfully submitted,



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DATED: July 2, 1982

In the Supreme Court of Georgia

Decided: APR 6 1982

38247. SMITH v. THE STATE

WELTNER, Justice.

The defendant was convicted of armed robbery and murder of 82 year-old Daniel Turner. The jury returned a finding that the murder was outrageously and wantonly vile, horrible and inhuman in that the murder involved torture, depravity of mind and aggravated battery to the victim, and recommended that the defendant be sentenced to death. The trial court then sentenced the defendant to death for murder, and life imprisonment for the armed robbery.

1. In his first enumeration of error Smith contends that the trial court erred in admitting in evidence two black-and-white photographs of the victim. The two photographs showing the numerous stab wounds and head injuries received by the victim, one frontal and one rear view, cannot be said to be repetitious and cumulative. The state complied with our suggestion in Florence v. State, 243 Ga. 738, 741 (fn. 1) (256 SE2d 467) (1979). The photographs were relevant in that they depicted the location and nature of the wounds received by the victim and corroborated the confession of the defendant. Davis v. State, 242 Ga. 901 (252 SE2d 443) (1979); Brooks v. State, 244 Ga. 574 (261 SE2d 379) (1979); Cobb v. State, 244 Ga. 344 (260 SE2d 60) (1979); Franklin v. State, 245 Ga. 141 (263 SE2d 666) (1980); Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980). We find no merit in this enumeration of error.

Smith further complains that by admitting the photographs, the jury was given the opportunity to make a decision as to the cause of death. The defendant overlooks the fact that this is the ultimate fact facing the jury in

any murder trial -- death at the hand of the defendant.

2. In his second and third enumerations of error, Smith contends that the trial court erred in not defining the term "mitigating" and in not specifying the mitigating circumstances offered by him.

In Potts v. State, 241 Ga. 67, 86 (16) (243 SE2d 510) (1978), this court held: "Under Georgia law, mitigating circumstances are not required to be singled out in the charge. Thomas v. State, 240 Ga. 393, 401 (242 SE2d 1) (1977)"; and in Collier v. State, 244 Ga. 553, 568-9 (12) (261 SE2d 364) (1979), the court held: "The trial court charged that the jury was to 'consider all the evidence submitted in both phases of the trial in arriving at your verdict, including any and all evidence of mitigating circumstances.' It is not required that specific mitigating circumstances be singled out by the court in giving its instructions to the jury. [citations omitted] To influence the jury by use of examples may limit their discretion to consider other matters in addition to the examples given. A charge such as the one requested may influence the jury either to weigh mitigation against aggravation or to limit their consideration to whether mitigating circumstances exist. Under our statute the jury may recommend a life sentence even though no mitigating circumstances are found." Accord Stevens v. State, 247 Ga. 698 (18) (278 SE2d 388) (1981).

The charge concerning mitigation was not improper, nor was it subject to the deficiencies discussed in Spivey v. Zant, 661 F2d 464 (5th Cir. 1981). The triers of fact were not limited in what they might consider in mitigation. Eddings v. Oklahoma, ____US____, 30 CLR 3047, Case No. 80-5727, decided January 19, 1982. Mitigation being a word of common meaning and understanding, it is not error to fail to define it. Cape v. State, 246 Ga. 520 (272 SE2d 487) (1980).

3. Smith's fifth enumeration of error asserts that the trial court erred in instructing the jury to disregard an emotional outcry by Smith's mother during the sentencing phase of the trial.

The transcript reflects the following events during examination of Smith's mother by his counsel:

"MRS. SMITH: I'm begging y'all. Please don't take him away from me. (Witness crying). Punish him, yes, but don't kill him.

"MR. KEEBLE: Miss Mary, please compose yourself. All right? Just answer [the District Attorney's] questions."

The District Attorney then cross-examined Mrs. Smith, asking but seven questions, whereupon the witness was dismissed, and another witness was called on behalf of Smith. It was at this point that the court stated to the jury: "Ladies and gentlemen of the jury, I believe this is a serious matter, but I will ask you to please disregard the emotional outbreak. It has no part in this trial. We're here to decide this matter -- you are -- from the evidence and the law, and you decide it from that."

No objection was made to this instruction and we cannot say that the trial court abused its discretion in so instructing the jury. Messer v. State, 247 Ga. 316, 324 (6) (276 SE2d 15) (1981), and cases cited. It is apparent that the trial judge's ruling was not an impermissible comment on the evidence. See High v. State, 247 Ga. 289 (276 SE2d 5) (1981).

4. In his sixth and seventh enumerations, Smith contends that both the death penalty statute and the Georgia Unified Appeal procedures are unconstitutional, both as constituted, and as applied in this case. "This court and the Supreme Court of the United States have upheld the constitutionality of the Georgia death penalty statute in a number of cases, and the appellant has advanced no new reason for us to reconsider our position. Gregg v. Georgia, 428 U.S. 153 (96 SC 2909, 49 LE2d 859) (1976); Legare v. State, 243 Ga. 744 (257 SE2d 247) (1979)." Stevens v. State, supra at 707.

Smith avers that the statutes have been applied in fact in an arbitrary and capricious manner. He points to no facts which support this conclusion. The same attack has been raised before and decided adversely to Smith's position.

McCorquodale v. Balkcom, 525 F.Supp. 408, 525 F.Supp. 431 (N.D. Ga. 1981).

This court has also upheld the constitutionality of the Unified Appeal procedure in Sliger v. State, 248 Ga. 316 (282 SE2d 291) (1981), cert. denied, _____US_____(decided February 22, 1982). Certainly, to determine at a state in the proceeding when a remedy might be provided whether a client is satisfied with his attorney's handling of his case is not invading the attorney-client relationship, as urged upon us by Smith. Neither does that determination call into question the "judgment of the accused's counsel." Similar procedures are used to determine competency of counsel when guilty pleas are tendered, Fair v. State, 245 Ga. 868 (268 SE2d 316) (1980); and, it cannot seriously be argued that these procedures, which are designed to protect the rights of a defendant, violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

* * *

We have studied the entire record of this case, and turn now to two matters which are not addressed in the enumeration of error.

The trial court charged on insanity as follows: "Thus, if you find the defendant did not have reasonable sufficiency to distinguish between right and wrong because of mental disease, injury or congenital deficiency, and [emphasis supplied] that he acted as he did because of delusional compulsion, as I have instructed you, at the time the commission of such alleged offense, that would be an end of your consideration of this case and you would stop at that point and enter a verdict that would reflect your findings. And the form of that verdict would be, 'We, the jury, find the defendant not guilty by reason of insanity.'"

It is possible that the use of the conjunction "and" might be understood by the jury to imply that a verdict of not guilty by reason of insanity would require both an inability to distinguish right and wrong and delusional

compulsion.

We have reviewed the record in this case relative to any evidence of insanity which could support a finding of not guilty by reason of insanity. The most the evidence shows is that Smith had a low IQ, possibly equivalent to that of an eleven year-old child. There is a vast difference between low intelligence and an inability to distinguish between right and wrong. Indeed, the psychiatric testimony in the case indicates that 10% of the population has an intelligence level not greater than Smith's.

In final argument, Smith's counsel addressed the question of insanity as follows: "And [the judge] will charge you, I would expect, that you are to consider in your deliberations, taking your experience into that jury room, that you are to consider the absolute senselessness of the act. I will say to you the absolutely bizarre, totally senseless taking of Mr. Dan's life. You can consider that, ladies and gentlemen, in your deliberation. And, in that event, you would be authorized, if you so found, that because of the very nature of the act and the other evidence that has been presented to you, and I submit to you his IQ level, that he was insane at the time he did it. He just went beserk. No planning was involved in this thing. Certainly there's no logic to it, any way you can look at it. So I submit to you, ladies and gentlemen, that we're talking about a ten or eleven year-old child...." There being no evidence, and no suggestion by counsel, of an inability to distinguish between right and wrong or of acts which were the consequence of an insane delusion, any want of precision in the charge relative to these two principles is at most harmless error. Lively v. State, 178 Ga. 693 (12) (173 SE 836) (1934); Reece v. State, 212 Ga. 609 (94 SE2d 723) (1956); Woods v. State, 214 Ga. 546 (105 SE2d 896) (1958).

We note, also, that the court submitted to the jury a

prepared verdict in the form as follows:

"VERDICT

COUNT I: 'We, the jury, find the defendant (guilty-not guilty) of murder.'

COUNT II: 'We, the jury, find the defendant (guilty-not guilty) of armed robbery.'"

After the charge, defense counsel remarked that the form did not contain a place for a finding of not guilty by reason of insanity. There was, however, no objection. The court inquired of the defense counsel "Do you think that's all right?" He responded, "Yes, sir."

The failure of the court to submit a form including all of the possible forms of the verdict was not harmful, in view of our holding as to the issue of insanity in this case.

If prepared forms for verdicts are to be submitted to juries, it is obviously preferable that the submission contain a form for each verdict which might be permissible in the case. Because court-submitted documents are still rare in our practice, particular attention should be given, lest the jury draw an inference, however unfounded, of predisposition on the part of the trial judge. Here, as example, the form contains in parenthesis the words "guilty-not guilty." While there is no such evidence in this case, some other jury might perceive the antecedence of the word "guilty" over the words "not guilty" to be expressive of the view of the court. It would be safer were the words guilty and "not guilty" omitted entirely from the form, to be completed by the hand of the jury.

SENTENCE REVIEW

As required by Ga. L. 1973, p. 159, et. seq., [Code Ann. §27-2537 (c) (1-3)], we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, and the evidence concerning the crime and the defendant.

As provided for by the Unified Appeal procedure, we have reviewed independently the record and transcript and

find no significant potential of error other than those enumerated by the appellant.

5. Appellant argues that the sentence of death was imposed under the influence of passion, prejudice and other arbitrary factors, because the jury was inflamed by the death of an 82 year-old white man by a 21 year-old black man, together with gory photographs. We do not agree. Two photographs were not cumulative nor unnecessarily gruesome considering the scenes which they depicted. They are plainly admissible. Division 1, supra. The record is bare of any indication that the jury abdicated its oath for passion or prejudice. The appellant further asserts the "Private Slovik syndrome" for the first time on appeal. This argument is without merit. House v. Stynchcombe, 239 Ga. 222 (236 SE2d 353) (1977); Cape v. State, 246 Ga. 520 (272 SE2d 487) (1980). We find that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

6. The jury found the following statutory aggravating circumstances justifying the death sentence: "The repeated stabbings along with two blows in the head justifies aggravating circumstances. Also the fact he was first stabbed in the back. Also the fact that he received the blows to his head after he was lying on the floor suffering from the stab wounds. For the said offense of murder was outrageously and wantonly vile, horrible and inhumane, in that the murder involved torture, depravity of mind and aggravated battery to the victim."

The State presented evidence that on June 8, 1981, Smith walked to Turner's grocery store in Lexington, Georgia. Smith had known Turner, whom he referred to as "Mr. Dan," as long as he could remember, and Turner had always been good to him. When he arrived at the store, Turner was asleep but awoke to wait on him. He asked for a pack of cigarettes and observed that Turner was alone. When Turner reached around for the cigarettes, Smith grabbed him, and

Turner resisted. Smith pulled a knife out of his back pocket and repeatedly stabbed Turner until Turner dropped a hammer he had picked up. Smith grabbed the hammer and hit Turner with it twice in the head. At that time Smith saw that Willie Robinson had come to the door. The appellant went to the door and told Willie Robinson, "Damn, I have killed Mr. Dan." He instructed Willie Robinson not to tell anyone. Smith thereafter went back in the store from the front door and took money from the cash register and Turner's wallet. He was observed running from the store. While he was running, he wrapped his shirt around his bleeding hand and the hammer. As he ran, he threw the hammer and the shirt on the side of the road. Eventually he threw Turner's wallet away.

Smith was captured by authorities on the night of the murder and the wallet, hammer, shirt, and $237.00 were recovered. Smith confessed to the crime and stated: "The reason for my actions, I was trying to get money for another car."

Shortly after the crime, a local veterinarian discovered Turner in his store under a large empty aluminum trash barrel, and several large cardboard boxes and other pieces of trash. Across the top of his head was a deep gash. He was lying unconscious in a pool of blood. His glasses had been knocked crooked; his false teeth plate was across his mouth. A broken knife blade was found in the fold of his shirt. Turner had been stabbed once below the corner of the right eye, four times in the upper right side of the chest, and twelve times in the back. He also had been struck in the head with a blunt instrument and a medical expert testified that these wounds could have resulted from the blows of a hammer. The 82 year-old victim died the next day from blunt force trauma to his head.

The sentence of death in this case rests upon the aggravating circumstances set forth in Code Ann. § 27-2534.1 (b) (7): "The offense of murder, rape, armed robbery, or

kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." We review the sentence in light of the United States Supreme Court's decision in Godfrey v. Georgia, 446 U.S. 420 (100 SC 1759, 64 LE2d 398) (1980), as construed by this court in Hance v. State, 245 Ga. 856, 861 (268 SE2d 339) (1980), as follows: "Torture occurs when the victim is subjected to serious physical abuse before death." The victim in this case was not killed instantaneously, but was stabbed a total of 17 times and then beaten about the head with a hammer. The victim lived almost a full day after the crime.

A defendant who tortures his victim may be found to have a depraved mind; and the age and physical characteristics of the victim may be considered in determining depravity of mind. Hance v. State, supra at 862.

This was not a "domestic" murder. The victim gave Smith no reason to assault him, and was in no manner threatening. Rather, Smith had known the victim for as long as he could remember, and the victim had been "good to him." Smith fled and attempted to hide his crime. See Godfrey v. Georgia, supra. The sole motive for the murder was the armed robbery of the victim to obtain money to purchase another car.

The evidence substantiates and supports the findings of the statutory aggravating circumstances, and the sentence of death. Under the facts of this case, we find that the murder was the type universally condemned by civilized society as wantonly vile, horrible, and inhumane as it involved torture to the victim as set forth above.

7. We have reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in Fleming v. State, 240 Ga. 142 (240 SE2d 37) (1977), and Hawes v. State, 240 Ga. 327 (240 SE2d 833) (1977). In reviewing the death penalty, we have considered the cases appealed to this

court since January 1, 1970 in which a death or life sentence was imposed and have listed in the appendix twenty-three similar cases imposing the death penalty.

This was a cold-blooded killing of an elderly man, committed in the course of an armed robbery, with the sole motive being financial gain. The cases in the appendix involve the unprovoked killing of an unarmed victim or victims during an armed robbery, and, therefore, illustrate a jury's willingness to impose a death sentence under these circumstances. Smith's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Judgment affirmed. All the Justices concur.

APPENDIX

Cunningham v. State, 248 Ga. 558 (___SE2d___) (1982); Cervi v. State, 248 Ga. 325 (___SE2d___); Justus v. State, 247 Ga. 276 (276 SE2d 242) (1981); Solomon v. State, 247 Ga. 27 (277 SE2d 1) (1980); Dick v. State, 246 Ga. 697 (273 SE2d 124) (1980); Dampier v. State, 245 Ga. 427 (265 SE2d 565) (1980); Tucker v. State, 244 Ga. 721 (261 SE2d 635) (1979); Gates v. State, 244 Ga. 587 (261 SE2d 349) (1979); Cobb v. State, 244 Ga. 344 (260 SE2d 60) (1979); Baker v. State, 243 Ga. 710 (257 SE2d 192) (1979); Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979); Potts v. State, 241 Ga. 67 (243 SE2d 510) (1978); Moore v. State, 240 Ga. 807 (243 SE2d 1) (1978); Stanley v. State, 240 Ga. 341 (241 SE2d 173) (1977); Corn v. State, 240 Ga. 130 (240 SE2d 694) (1977); Pulliam v. State, 236 Ga. 460 (224 SE2d 8) (1976); Dobbs v. State, 236 Ga. 427 (224 SE2d 3) (1976); Mitchell v. State, 234 Ga. 160 (214 SE2d 900) (1975); Floyd v. State, 233 Ga. 280 (210 SE2d 810) (1974); Gregg v. State, 233 Ga. 117 (210 SE2d 659) (1974); Hunter v. State, 231 Ga. 494 (202 SE2d 441) (1973); Kramer v. State, 230 Ga. 855 (199 SE2d 805) (1973); Lingo v. State, 226 Ga. 496 (175 SE2d 657) (1970).

EXAMINATION

BY THE COURT:

Q Mr. Ray, the Court would like to ask you a question, please, sir.

A All right.

Q Are you conscientiously opposed to capital punishment?

A I don't guess so.

Q In other words, you would listen to the evidence in the case and the charge of the Court and go by that, even if it included a possibility of capital punishment?

A Yeah.

THE COURT: What do you say, gentlemen?

MR. KEEBLE: Yes, sir.

MR. MILLER: Yes, sir.

THE COURT: Thank you, Mr. Ray. You may go. John W. Monk.

SHERIFF: Mr. Monk.

THE COURT: Hey, Mr. Monk. Have a seat right here, please, sir. Did you get some lunch?

JUROR: Yes, sir.

THE COURT: Good.

EXAMINATION

BY THE COURT:

Q Mr. Monk, the Court wanted to ask you a question, a voir dire question, concerning your possibly being a prospective

juror in this case. Are you conscientiously opposed to capital punishment?

A I've got mixed emotions about it. I've always said that I was opposed to it, but I'm beginning to change my mind. But I haven't come to a complete satisfaction about it.

Q Let me ask you this question, Mr. Monk. Could you listen to the evidence in the case and then listen to the Court tell you what the law is, and would you go by that and go by the law that the Court gives you even if it included capital punishment?

A I wouldn't have any trouble really with a verdict of guilty, but I don't know whether I could vote to send a man to the electric chair or not.

Q Even if the Court included that in its charge, you wouldn't go by what the Court said, and you'd do something else? You'd obey the law, wouldn't you?

A I try to to the best of my ability, but I've got to stick to what I believe in, too. And I just don't know whether I could or not.

Q Well, I don't want to press you on it too hard, but I do have to have an answer yes or no, if that's possible. If you can't, of course, then you can't give me a yes or no.

A Well, right now, the way I feel, if I came to that position, I just don't feel like I could honestly.

Q So, in other words --

A With my religious belief.

Q In other words, under no circumstances would you vote for the death penalty? There's no circumstances that you could think of that you would vote for the death penalty, if the case got to that point?

A Not right at this time, no, sir.

Q So, the Court can assume, then, that the answer to my question to you is yes, that you are conscientiously opposed to capital punishment?

A Right.

THE COURT: What do you say, Mr. Keeble.

MR. KEEBLE: One question.

THE COURT: Sure.

MR. KEEBLE: Sir, Mr. Monk, there's no possible situation, no matter how horrible and vile the crime may be, that you could consider the death penalty?

A I don't think that has anything to do with it as far as I'm concerned. My problem is with my religious beliefs and what the Lord tells me to do.

MR. KEEBLE: I can respect that.

A And I have done a lot of research lately. I have come to the point that I feel like we've got to do something in our courts -- and I don't mean to make a speech here, but I do want to state my position. And I have...am leaning that direction, that we've got to do something. We've got to make it stiffer

on crime. But --

MR. KEEBLE: In response to my question that the crime could be so horrible and vile? You don't think you could impose it under any of those type situations?

A Not right now, until I search this thing out. And I have honestly, before this came up, been doing some research on it, and I have not come to the point that I feel like I could do it.

THE COURT: Mr. Miller, do you have any questions of Mr. Monk.

Q (The Court) Mr. Monk, the Court then assumes, from your answers to my questions and Mr. Keeble's questions, in this case or any other case, there's no circumstances under which you would ever vote for the death penalty at this time?

A At this particular time, I would not.

Q So the answer to my question, "Are you conscientiously opposed to capital punishment?" at this time, is yes?

A Yes.

THE COURT: Thank you, sir. You may go. What do you think, gentlemen?

MR. MILLER: I think the juror should be stricken.

MR. KEEBLE: Your Honor, I realize under Witherspoon that he's qualified but, for the record, I would take exception.

THE COURT: Now, wait a minute. Say that again.

MR. KEEBLE: I realize, under Witherspoon, that he

he would not be qualified and that, under Witherspoon, the Court has a right to excuse him.

THE COURT: The Court has got a duty to excuse him.

MR. KEEBLE: Yes, sir, under the law.

THE COURT: That's right. That's what I'm here to do, is uphold the law.

MR. KEEBLE: Exactly. But, Your Honor, we feel that constitutionally the defendant is still entitled to representative jurors of a cross section of society.

THE COURT: In other words, you're asking this Court to disregard Witherspoon, which is a decision of the United States Supreme Court...to disregard that decision and rule with you in this matter? Is that what you're asking the Court to do, Mr. Keeble?

MR. KEEBLE: Yes, sir.

THE COURT: Overrule. He's excused.

SHERIFF: Who do you want next?

CLERK: Mrs. Daryl Johnson.

THE COURT: Mrs. Daryl Johnson.

SHERIFF: Mrs. Daryl Johnson.

THE COURT: How are you doing, Mrs. Johnson?

EXAMINATION

BY THE COURT:

Q Mrs. Johnson, the Court wanted to ask you a question, please, ma'am, concerning your being a prospective juror in this

CHARGE OF THE COURT

AS TO SENTENCE

Now, ladies and gentlemen of the jury, it is my duty, as presiding Judge in this case, to instruct you now as to the law governing the sentencing phase of this case. The instruction given you earlier by The Court and the rule of law outlined to you in this portion of the instructions apply also to your deliberations as to the penalty. Let me go over that with you again in case you didn't catch it. The charge and instructions that I gave you earlier on the guilt or innocence phase of the trial will apply and rules of law applying to you then will also apply as a portion of the instruction, and also for your deliberations during the penalty phase of this trial.

I charge you, ladies and gentlemen of the jury that the law of Georgia provides that the death penalty may be imposed in certain cases provided the jury finds beyond a reasonable doubt that the offense for which the accused was convicted was committed under what the law described as statutory aggravating circumstances. In this case, the State contends that the offense of murder for which the accused has been convicted was committed under one of these aggravating circumstances, and that aggravating circumstance contended is: For the said offense of murder was outrageously and wantonly vile, horrible, and inhumane in that the murder

involved torture, depravity of mind, and aggravated battery to the victim. Such a circumstance is defined as a statutory aggravating circumstance under the law of this state.

Ladies and gentlemen of the jury, you have found the defendant guilty of the offense of murder, and you may recommend one of two sentences to The Court as punishment. If you believe beyond a reasonable doubt that the offense was committed under the aggravating circumstance, as contended by the State, if you do so find, you may recommend that this defendant be put to death by adding to your verdict, "We recommend death and find the following statutory aggravating circumstance beyond a reasonable doubt." And you must set forth in writing the aggravating circumstance which you find to exist. If you do add that recommendation, the accused will be sentenced to be put to death in the manner provided by law, which in this state is electrocution.

The other punishment which you may recommend back to The Court in this case is life imprisonment. If you do not believe beyond a reasonable doubt that this defendant should be put to death, you may leave your verdict as it is. That is, that you find the defendant guilty, and the effect of this sentence would be that The Court would sentence the accused to life in prison.

Now, ladies and gentlemen of the jury, you should consider all of the evidence, both the evidence submitted

during the sentence phase, as well as the evidence submitted at the prior phase of this trial, in arriving at your verdict as to the sentence to be imposed. This includes any evidence of mitigating circumstances received by you in this case.

Ladies and gentlemen of the jury, even if you find beyond a reasonable doubt that the state has proved the existence of aggravating circumstances in this case which would justify under the law the imposition of a death sentence, you are not required to recommend that the accused be put to death. You would be authorized under these circumstances to recommend the death penalty, but you are not required to do so. The sentence to be imposed in this case is a matter entirely within your discretion and you may provide for a life sentence for this accused for any reason that is satisfactory to you or without any reason if you care to do so. The law vests the exclusive right with the jury to either make or withhold a recommendation for the death penalty.

Of course, if the state has failed to prove beyond a reasonable doubt that the offense was committed under the aggravating circumstances described to you, you are not authorized to recommend the death penalty. Without such a finding, the death penalty cannot be imposed. In that event, you would leave your verdict as it is, and the effect of that

would be that The Court would sentence the defendant to life in prison.

The law requires me to give to you , the jury, certain instructions in writing and that the jury, if its verdict be a recommendation of death, shall designate in writing the aggravated circumstance or circumstances which it finds to exist beyond a reasonable doubt.

I will furnish you a written copy of this portion of the Charge which includes the contended for aggravated circumstance in this case. And I charge you that in the event you recommend death as a penalty in this case, you should write out the recommendation and your finding as to any statutory aggravated circumstance in the form which I have given you in these instructions.

Now, ladies and gentlemen of the jury, I charge you that the form of your verdict would be, if you determine that the penalty would be life in prison, would be, "We, the jury, recommend and fix the defendant's punishment as life in prison." On the other hand, if you determine that you would recommend the death penalty, the form of your verdict would be, "We, the jury, recommend and fix the defendant's punishment as follows: Death." If death is recommended and fixed as punishment, complete the following "We further find the following aggravated circumstance," and you simply write that in on the bottom of this form.

The contended for aggravated circumstance, as I've said, is attached to these written instructions which I will send out with you.

With these instructions and to remind you again that you consider all of the evidence presented during the guilt or innocence phase of this trial, and you consider all of the evidence presented during the penalty phase of the trial, and you consider all of the law that I gave you in charge previously as well as this charge in connection with the penalty phase of the proceedings.

With these instructions, now I will ask you, ladies and gentlemen to retire to your jury room and to begin your deliberations after I send the other evidence to you. You may go.

APPEARANCE FORM

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JUL 2 1982
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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

No. ~~82 5001~~

WILLIAM ALVIN SMITH (Petitioner or Appellant) vs. STATE OF GEORGIA (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for William Alvin Smith

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Stephen H. Glickman

(Type or print) Name Stephen H. Glickman

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Zuckerman, Spaeder, Taylor & Kolker

Address 1201 Connecticut Avenue, N.W., Twelfth Floor

City & State Washington, D.C. Zip 20036

Phone (202) 775-1440

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

RECEIVED
JUL 2 1982
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SUPREME COURT, U.S.

No 82-5001

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner,

-against-

STATE OF GEORGIA

Respondent.

CERTIFICATE OF SERVICE

I, Stephen H. Glickman, a member of the Bar of this Court, do hereby certify that I have served a copy of petitioner's Petition for a Writ of Certiorari and petitioner's Motion to Proceed In Forma Pauperis upon the respondent this 2nd day of July, 1982, by mailing a copy, first class, postage prepaid, to its counsel of record in the proceedings below at the following address:

Virginia H. Jeffries
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

Stephen H. Glickman

Stephen H. Glickman
Zuckerman, Spaeder, Taylor & Kolker
1201 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036

Counsel for Petitioner

RECEIVED
JUL 2 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No 82- 5001

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner,

-against-

STATE OF GEORGIA

Respondent.

MOTION FOR LEAVE TO PROCEED IN THIS COURT IN FORMA PAUPERIS

Petitioner, by and through counsel, moves this Honorable Court, pursuant to Rule 46 of this Court, to permit him to proceed with this action in forma pauperis. As evidence of petitioner's poverty and in accordance with Rule 46, petitioner has submitted a notarized Affidavit of Poverty.

Petitioner prays that this Court grant this motion.

Respectfully submitted,

Stephen H. Glickman
Zuckerman, Spaeder, Taylor & Kolker
1201 Connecticut Avenue, N.W.
Twelfth Floor
Washington, D.C. 20036
202/775-1440

Counsel for Petitioner

2. Have you received within the last twelve months any money from any of the following sources?

a. Business, profession or form of self-employment? Yes___ No X
b. Rent payments, interest or dividends? Yes___ No X
c. Pensions, annuities or life insurance payments? Yes___ No X
d. Gifts or inheritances? Yes___ No X
e. Any other sources? Yes___ No X

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own cash, or do you have money in checking or savings account?

Yes ___ No X (Include any funds in prison accounts.)
If the answer is "yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes X No X
If the answer if "yes," describe the property and state its approximate value. [redacted]

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

X William Alvin Smith
WILLIAM ALVIN SMITH

STATE OF GEORGIA
COUNTY OF BUTTS

WILLIAM ALVIN SMITH, being first duly sworn under oath, presents that he had read and subscribed to the above and states that the information therein is true and correct.

X William Alvin Smith
WILLIAM ALVIN SMITH

Subscribed to and sworn to before me, this the 21 day of May, 1982

Carol Rogers
Notary Public

My Commission expires:
4-20-83

RECEIVED
JUL 2 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, WILLIAM ALVIN SMITH, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to relief.

1. Are you presently employed? Yes ___ No X

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

   ---

   b. If the answer is "no," state the date of last employment and theamount of salary and wages per month which you received.

   June-4-1980

   The amount $700.00 Monthly

NO. 82-5001

Office-Supreme Court, U.S.
FILED
AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM ALVIN SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

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Senior Assistant
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MICHAEL J. BOWERS
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Attorney General

MARION O. GORDON
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Attorney General

Please serve:

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QUESTION PRESENTED

1.

Whether Petitioner's challenge to the exclusion of a juror pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968) is properly before this Court?

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NO. 81-5001

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM ALVIN SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, William Alvin Smith, was indicted by the Superior Court of Oglethorpe County during the May Term, 1981 for armed robbery and the murder of Daniel Lee Turner. Following a trial by jury, Appellant was found guilty and sentenced to death for the offense of murder and to life imprisonment for the offense of armed robbery. Petitioner subsequently filed an appeal to the Georgia Supreme Court. The conviction and sentence were affirmed at Smith v. State, 249 Ga. 228 (1982), 290 S.E.2d 43 (1982).

The facts which gave rise to Petitioner's conviction are succinctly set forth in Smith v. State, supra, and because the underlying facts of Petitioner's conviction have no direct bearing upon the legal issues presented on this application for a writ of certiorari, they will not be repeated herein.

PART TWO
REASON FOR NOT GRANTING THE WRIT
ARGUMENT AND CITIATION OF AUTHORITY

I. PETITIONER'S CHALLENGE TO THE EXCLUSION OF A JUROR PURSUANT TO WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) IS NOT PROPERLY BEFORE THIS COURT ON THIS PETITION.

In this petition for a writ of certiorari, Petitioner seeks to challenge the exclusion of a juror pursuant to Witherspoon v. Illinois, 391 U.S. 510 (1968). Petitioner asserts, for the first time in any appellate review, that juror Monk was improperly excused for cause. Petitioner contends that in light of the trial Court's charge that regardless of the facts, the jury could reject the death penalty for any reason or no reason, the excluded juror would have been able to obey the Court's instructions and the law, and that thus, the exclusion of juror Monk was not dictated by this Court's holding in Witherspoon v. Illinois, supra.

Petitioner argues that although his appellate counsel did not raise this issue on direct appeal to the Georgia Supreme Court, he is not now barred from raising the issue in the instant petition because, pursuant to the Georgia Unified Appeal Procedure, the Georgia Supreme Court reviewed the record and transcript and found no significant potential of error other than those enumerated by Petitioner's trial counsel.

Respondent asserts that contrary to Petitioner's argument, the review of capital cases by the Georgia Supreme Court pursuant to the Unified Appeal Procedure does not preserve any and all issues for the purpose of appellate review. The Unified Appeal Procedure, as set forth in Ga. Code Ann. § 27-2538, establishes a review procedure for presenting to the sentencing court and to the Georgia Supreme Court all possible challenges to a judgment and sentence. Its purpose is to make certain that all possible matters have been considered by defense counsel so that the record will be complete for all possible challenges. The Unified Appeal Procedure does not act as an automatic appellate review of all challenges; rather, it brings to the attention of counsel and the trial court the existence of any error so that errors may be corrected in a timely manner at the trial level. Thus, the Unified Appeal Procedure, which dictates the use of a series of check lists prior to, during, and after the trial of a capital case, is designed to expose and correct any error at the trial level; its purpose is not for the Georgia Supreme Court to conduct a sweeping and all encompassing review of any issue, whether or not it was raised by appellate counsel.

Rule 17 of the Rules of the Supreme Court of the United States sets forth the considerations governing review on certiorari. This rule indicates that a review on a writ of certiorari is not a matter of right, but of judicial discretion, and the rule sets out three examples that are indicative of the character of reasons for granting a review on a writ of certiorari. Each of these examples are situations where a lower court has decided a federal question. The Rule sets forth no examples of a situation where review on certiorari would be considered when the federal question has neither been presented to nor decided by a lower court.

Additionally, in Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), this Court held that unless it appears on the record that a federal question was both raised and decided in the State Court below, the United States Supreme Court's appellate jurisdiction fails.

Respondent respectfully submits that the sole federal question presented in this petition for a writ of certiorari has never been raised, preserved or passed upon in the Georgia Courts, and that thus, the petition for a writ of certiorari should be denied for lack of jurisdiction.

CONCLUSION

The Respondent respectfully submits that this Court should refuse to grant a writ of certiorari to the Superior Court of Butts County as it is clear that the federal question presented in this petition has not been presented to or decided by a lower court, and as the decision sought to be reviewed is demonstrably in accord with the decisions of this Court.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
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CERTIFICATE OF SERVICE

I, JOHN C. WALDEN, Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon Petitioner's attorney by depositing a copy of the same in the United States Mail, with proper address and adequate postage to:

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This 3rd day of August, 1982.

JOHN C. WALDEN

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SUPREME COURT, U.S.

No. 82-5001

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner

-against-

STATE OF GEORGIA

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME
COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

THIS COURT HAS JURISDICTION TO GRANT THE PETITION FOR A WRIT OF CERTIORARI, BECAUSE THE FEDERAL QUESTION PRESENTED WAS RAISED AND DECIDED BY THE COURTS BELOW

At the outset of petitioner's trial, the trial court excluded a prospective juror because of his conscientious opposition to capital punishment. The trial court -- takenly believed that it was bound to do so by thi[illegible]t's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). App. 15a-16a.[1/] While the "death-qualification" of petitioner's jury was inconsistent with the s[illegible]rinciples of law enunciated in Adams v. Texas, 448 U.S. 38 (1980), its constitutionality is still an unresolved issue.

Without denying that the petition in this case presents a federal question of fundamental importance, the State opposes on jurisdictional grounds the granting of a writ of certiorari in this case. The State argues that the constitutionality of the juror exclusion in this case was not raised and decided in the courts below, and that therefore under 28 U.S.C. §1257(3) this Court lacks jurisdiction to consider it now. In fact, however, the constitutional issue was presented in the trial court; was decided adversely to petitioner there; was preserved in the

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1/ References are to the appendix to the Petition for a Writ of Certiorari. Purporting to correct petitioner's counsel, the trial court stated that under Witherspoon it had "a duty to excuse" the juror, and further stated that to rule with petitioner it would have to "disregard" Witherspoon. Yet as this Court had recently emphasized, "it is clear beyond peradventure that Witherspoon is not a ground for challenging any prospective juror." Adams v. Texas, 448 U.S. 38, 47-48 (1980).

direct appeal to the Georgia Supreme Court; and was implicitly decided against petitioner there too. Petitioner can affirmatively demonstrate that even though the highest state court was silent on the federal question, that question was nonetheless properly presented and necessarily decided. Street v. New York, 394 U.S. 576, 581-582 (1969).

To begin with, at the trial level petitioner's counsel made a timely objection on Sixth and Fourteenth Amendment grounds to the Court's exclusion of the juror who had conscientious scruples against the death penalty.[2/] This objection was expressly overruled. Counsel subsequently did not, it is true, include this issue in his appellate brief to the Georgia Supreme Court as an enumeration of error. The issue was preserved and presented to the appellate court nonetheless, by operation of law. For under the Unified Appeal Procedure applicable to all death penalty cases brought in Georgia since August 25, 1980, the Georgia Supreme Court reviews "each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an

---

2/ App. 16a (asking trial court to disregard its view of Witherspoon because "constitutionally the defendant is still entitled to representative jurors of a cross section of society"). This was a specific and unambiguous reference to petitioner's Sixth and Fourteenth Amendment right to jurors impartially drawn from a representative cross-section of the community, Taylor v. Louisiana, 419 U.S. 522, 528 (1976), and to the correlative right, recognized in Witherspoon and Adams, not to have death-scrupled jurors unfairly excluded in a capital case. More precision than petitioner's court-appointed counsel mustered is not demanded. Cf. Braniff Airways v. Nebraska State Board, 347 U.S. 590, 598-599 (1954); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the [Georgia] Supreme Court."[3] This provision was added for petitioner's protection, and he was entitled to rely on it. The State does not now contend that the Georgia Supreme Court ignored this obligation to petitioner, nor could it. For in its opinion the court expressly stated:

> As provided for by the Unified Appeal Procedure, we have reviewed independently the record and transcript and find no significant potential of error other than those enumerated by the appellant.

App. 6a-7a. Thus the Georgia Supreme Court confirmed that it had considered and rejected petitioner's constitutional challenge to the juror exclusion at his trial.[4]

Petitioner therefore respectfully submits that there should be no doubt about his compliance with this Court's jurisdictional requirements. If, however, any doubt does remain, petitioner would request the Court to grant a continuance in its consideration of the petition pending an application to the Georgia Supreme Court for a certificate stating whether the federal question was raised and decided on its merits. Allenberg Cotton Co. v. Pittman, 414 U.S. 1109 (1973); Lynumn v. Illinois, 368 U.S. 908 (1961).

3/ Unified Appeal Procedure, Part IV(B)(2), Appendix to Ga. Code Ann. Chapter 27-25 (following Section 27-2538) (Supp. 1981) (emphasis added).

4/ It is not surprising that the court did not discuss the question in its opinion, for it had already dealt with it in a number of previously published opinions. E.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 66 (1979); Potts v. State, 241 Ga. 67, 243 S.E. 2d 510, 514-515 (1978).

See Stern and Gressman, Supreme Court Practice §3.29 (5th ed. 1978). The Georgia rules clearly permit this procedure to be followd. Ga. Code Ann. §24-4536 Rule 36.

CONCLUSION

Petitioner respectfully submits that the important federal question presented by the petition for a writ of certiorari was raised in each court below and was decided on its merits adversely to petitioner by each court below; and that therefore this Court should grant the writ.

Respectfully submitted,

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I, STEPHEN H. GLICKMAN, a member of the Bar of this Court, do hereby certify that I have served a true and correct copy of petitioner's foregoing Reply to Respondent's Brief in Opposition upon the respondent this 30th day of August, 1982, by depositing a copy of the same in the United States Mail, with proper address and adequate postage to:

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